SUPREME COURT DECISION.

(Continued from Second Page.

te of inheritance without any interposg vested freehold.

28 Am. & Eng. Ency. of Law. 1st Ed. 4.

Also at common law a mortgagee in ssession as such might commit waste aless he had expressly covenanted ainst it, but he would be required to pply the rents out to the interest and rincipal of the mortgage debt in an acon to foreclose or redeem.

Greenleaf's Cruise on Real Property, ol. 2, p. 311.

Hilliard on Mortgages, 4th Ed. Sec. 1123.

28 Am. & Eng. Ency. of Law, 1st Ed., p. 7.

Hanson vs. Derby, 2nd Vernon, 392.

McCormack vs. Digby, 8 Black. (Ind.)

Onderdonck vs. Gray, 13 N. J. Eq. 65.

"Although a mortgagee in fee in possession has a right at law to commit any kind of waste, because he is considered s the absolute owner of the inheritance, et he will be restrained in equity; and he court of chancery will also decree an account to be taken of the trees cut down nd direct the produce to be applied first o the payment of interest due on the ortgage, and then in reducing the rincipal."

Greenleaf's Cruise on Real Property, upra.

In Onderdonk vs. Gray, *supra*., it is aid: "A mortgagee in possession is ountable to account for all rents, issues and rofits received by him, and for all waste nd destruction of the premises, and must deduct the allowance for these matters from the amount due on his mortgage; and Gray has adopted the proper ourse to entitle him to such allowance —filing a cross bill and praying for such account and to be allowed to redeem on paying the balance. But such allowances an only be claimed either on a bill to oreclose or a bill to redeem against a mortgagee in possession and in possession as a mortgagee. He cannot be called o account in such suits for trespass ommitted by him; nor if he is in possession as a tenant of a mortgagor under a lease from him, which a mortgagee may take as well as a stranger, can the mortgagee claim an allowance for rent due on the lease or waste committed as a enant."

See also Guthrie vs. Kahle, 46 Pa. St. 81.

Keeping these general principles in mind, we come to the main question presented by the averments in the first ount of the complaint—the right of the Administrator to maintain an action to redeem. Generally, such action can be maintained by those who have an interest in the mortgaged premises, and would be losers by foreclosure.

"Any person who holds a legal estate in the mortgaged premises, or any part thereof, derived through, under or in privity with the mortgagor, and any person holding either a legal or equitable lien on the premises, or any part thereof, under or in privity with the mortgagor's estate, may also in like manner redeem from a prior mortgage."

Pomeroy's Eq. Jursp. 280.

"No person can come into a court of equity for a redemption of a mortgage but he who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him * * *. If the Respondents have shown no interest in themselves or a right to redeem the mortgage on their own account, or on account of others with whom some connection is shown, and whose interest they have a right to represent, their claims cannot be supported, notwithstanding some other person might have a right to enforce the same claim."

Grant vs. Duane, 9 Johns (N. Y.) 611.

At common law the real property of a decedent could not be subjected to the payment of simple contract debts, and was not subject to administration, but in this, as in nearly all of the States, this rule has been changed by statute, and the real property while descending to the heirs is made subject to the payment of debts in the course of administration and becomes assets in the hands of the administrator for that purpose. Hence it has been held that the Administrator may have such an interest in the lands of the decedent as would entitle him to redeem and therefor entitle him to maintain such an action. In one case it is said, "It is also claimed that the suit is improperly brought by the Administrator, and that the heirs should have been made parties. Whether in such cases the heirs are ever necessary parties under our system, where the bill is filed for redemption, or to remove an alleged cloud in the shape of an undischarged mortgage, it is not now important to examine. * * * The Administrator being entitled under the statute to the possession of the lands of his intestate, has such an interest as entitles him to redeem or to compel a release of a satisfied mortgage; and if the heirs would have been proper parties, the decree is nevertheless valid inasmuch as it does not complete justice as it stands provided it is sustained by the proofs."

Enos vs. Sutherland, 11 Mich. 541.

Discussing the same question in another case, the court says: "It is said that this bill cannot be maintained by the Administrator of Leach. In England where the real estate upon the death of the intestate passes directly to the heir and is not assets in the hands of the Administrator for the payment of debts, the bill should be brought by the heirs. But with us the law is different. The action of ejectment is given to the Administrator and the heirs cannot have the action until there has been a division of the estate under a decree of the probate court in cases where a division is necessary. It is the duty of the Administrator to pay off the debts out of the personal estate, if sufficient for that purpose, and prepare the estate for distribution among the heirs. To discharge this duty he must of necessity, be permitted to maintain a bill of this description as the only means of ascertaining what may be due, if anything, on the mortgage."

Merriam vs. Barton, 14 Vermont. 513.

It will be noted that the right of the Administrator to maintain an action to redeem the intestate's land from a mortgage is based upon the express provisions of the law, making the lands assets in his hands to be administered upon and giving to him the right of possession thereof for the purposes of administration. Notwithstanding our statute gives the administrator appointed thereunder the right of possession of the lands of the intestate not exempted, and the right to the rents, issues and profits thereof for the purpose of administration, and the same become assets in his hands for the payment of debts, it cannot be claimed or maintained that he is entitled to the possession of lands in another State and under another jurisdiction, or that such lands become assets in his hands for the purposes of administration. Discussing the power of Administrators the Supreme Court of Iowa uses the following language: "The Administrator appointed in this State derives his powers from the statutes of this State. He succeeds to none of the powers or rights of the Pennsylvania Administrator. His appointment empowers him to collect such assets of the estate as may be found in this State, and he may make such disposition of them as is directed by the laws of this State; and he is not answerable for his conduct either to the foreign Administrator or to the power from which his authority is derived, but is independent of both. There is privity neither in law nor estate between them, and there is no general principle of law under which it can be held that a judgment against the one is binding upon the others."

Creswell vs. Slack, 68 Iowa, 113.

The Supreme Court of the United States in Johnson vs. Powers, discussing the same question, quotes with approval from the opinion of Mr. Justice Grier in Stacey vs. Thrasher in which he uses the following language: "The Administrator receives his authority from the ordinary or other officer of the government where the goods of the intestate are situate, but coming into such possession by succession to the interstate and encumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his interstate is a qualified one and extends not beyond the assets of which the ordinary had jurisdiction."

Johnson vs. Powers, 139 U. S. 160.

The following authorities hold to the same effect:

1 Woerner's Law of Admr. Sec. 158,

8 Am. & Eng. Ency. of Law, 1st Ed. 427,

Taylor vs. Barron, 35 N. H. 486,

Deery vs. Cary, 5 Wal. 803,

Braithwaite vs. Harvey, 36 Pac. (Mon.) 39,

State vs. Fulton, 49 S. W. (Tenn.) 297.

If, then, an action to redeem lands from a mortgage by setting off and applying damages in waste committed by the mortgagee in possession, as such, can only be maintained in an action to foreclose or redeem, and if the Administrator can only maintain an action to redeem as to such lands as are assets in his hands for the purpose of administration, or to which he is entitled to the possession, then it cannot be claimed that he has any power or right to maintain such action as to lands which are not assets in his hands and the possession of which he is not entitled to.

Considering now the right of an Administrator appointed under the law of this State to maintain an action for damages in the nature of waste committed after the death of the intestate by a mortgagee upon the mortgaged premises situated in another State, it is clearly apparent that if the rule laid down in the authorities above cited prevails here, no such authority, power, or right exists. If such claim for allowance for damages by waste can be made only in actions to foreclose or redeem under the reason given, then the Administrator cannot maintain an action in waste committed by a mortgagee upon the mortgaged premises in an independent action. It may with show of reason, be claimed, that the rights of a mortgagee and a mortgagor with reference to the possession of the mortgaged premises, have been changed by our statute, which declares that a mortgage of real property shall not be deemed a conveyance whatever its terms, so as to enable the owner of a mortgage to recover the possession of the real property without foreclosure and sale.

Gen. Stats. Sec. 3284.

The mortgagee, under the above provision, not having the right to recover the possession of the mortgaged premises before foreclosure and sale, has no right to the possession, therefore his entry upon the mortgaged premises and cutting the timber thereon was without authority of law—a trespass, for which he should be held liable in damages to the proper parties in a court of competent jurisdiction. If this be the correct view of the law, then he must be held liable for such damages under that section of our statute which gives a right of action to the "owner of such land" against any person who shall cut down, carry away any of the trees or timber thereon without lawful authority.

Gen. Stats. Sec. 3275.

Can it be claimed under these provisions of the law that the administrator appointed by the District Court of this State is in any sense such an owner of the lands situated in California upon which the Respondent, after the death of the intestate committed the alleged trespass, as would entitle him as such administrator, to maintain an action therefor? The title of the intestate to these lands upon his death vested under our statute, in his heirs. It certainly can not be pretended that the title to real estate in California upon the death of the intestate vested in the administrator in this State for any purpose whatever. Neither would the law of this State, under the authorities cited, vest in the administrator the right of possession or the right to recover the possession of said lands. If the administrator can have no title to the lands in California by virtue of his appointment as administrator in this State, if he is not entitled to the possession of the same under his appointment, he can have no right, title, or interest whatever in them, and therefore cannot be called the "owner" thereof in any sense or meaning of that word. This Court is giving an interpretation to the word "owner" as used in our Statutes, has been very liberal, holding that one who had the right of possession to be the owner thereof. For a full and exhaustive discussion of the question see State vs. Wheeler, 23 Nev. 143. If, then, the administrator cannot under these statutes maintain the action, we must look to other provisions of the law to ascertain whether such authority is given.

By Sections 165 and 166, Statutes 1867, pp. 144, 145, the Legislature has conferred authority upon administrators to maintain certain actions. In the last named section is found authority to maintain actions for trespass committed upon the real estate of the deceased while living. The facts shown here do not make a case within this provision, and the right of the administrator to maintain an action for trespass committed upon the lands of the deceased, situated in this State, can only arise by implication from his right to the possession, and the rents, issues and profits as conferred by preceding sections of the same act, (Sections 94 and 166) or by giving to the words "owner of such lands" of Section 3275, above cited, an interpretation that would allow the party entitled to the possession of such lands a right of action.

We must therefore conclude, that an administrator appointed under the laws of this State holds no such right, title or interest in and to the lands of his intestate situated in another State as would authorize him to maintain an action to redeem from a mortgage thereon by setting off against the mortgage debt waste committed thereon by the mortgagee in possession thereof as mortgagee after the death of the intestate, nor has such administrator such right, title, or interest in said lands as would authorize him to recover for such damage committed as aforesaid, nor has he such power or authority conferred by our statutes to maintain an action for damages in trespass committed by Respondent upon said lands after the death of the intestate.

The admitted wrong is not without its proper remedy, and the right of action can be maintained by the proper parties.

The judgment and order will be affirmed.

MASSEY, J.

I concur BELKNAP, J.

DISSENTING

Bonnifield, C. J.

A demurrer to the Plaintiff's complaint was sustained by the District Court on the grounds that said complaint "does not state facts sufficient to constitute a cause of action in favor of the Plaintiff and against the Defendant." Judgment was given to the effect that the Plaintiff recover nothing from the Defendant, and that the Defendent recover his costs of the Plaintiff taxed at the sum of three dollars. This appeal is taken from the judgment and from the order sustaining the demurrer.

It appears from the complaint that said William Price died intestate in October, 1897, at Washoe County, State of Nevada the place of his residence; that said Albert F. Price was duly appointed administrator of the estate of said deceased by the District Court of said County, and that he duly qualified and entered upon his duties as such Administrator; that in the year 1894, said William Price borrowed one thousand dollars of the defendant, a resident of said county, and then and there executed to defendant his promissory note therefor and thereupon to secure the payment of said note executed to the defendant a mortgage on certain section of timber land belonging to said Price, containing six hundred and forty acres and situated in Nevada County, State of California; that in January, 1897, default having been made in the payment of said note, Price at the request of the defendant executed and delivered to him at said Washoe County, a deed of conveyance for said land and premises; that said deed was absolute in form, but executed by Price and received by the Defendant only as security to secure the payment of said promissory note, and other sums advanced by Defendant on account of said land; that said deed was duly recorded in the office of the County Recorder of said Nevada County, State of California, on the 9th day of January, 1897; that at the time of the execution of said deed and at the date of the death of William Price said land was heavily timbered with trees suitable for the manufacture of lumber, sawed timbers and firewood; that said land with the timber standing thereon was worth at said dates twelve thousand dollars; that the Defendant since the death of said Price and without the permission of anyone representing said estate, and without authority from any source, willfully entered upon said land, erected thereon a sawmill, cut down a large number of the trees standing on said land, manufactured the same into lumber and sawed timbers, removed and carried said lumber and sawed timbers away from said land and converted the same to his own use; that said lumber and timber manufactured, removed, carried and converted as aforesaid by the Defendant, were and are of the net value of six thousand dollars; that there is due the Defendant on said promissory note and for certain payments made by the Defendant on account of said land the sum only of one thousand, seven hundred dollars in the aggregate.

The Plaintiff prays for judgment for treble the said sum of six thousand dollars, less the said sum of one thousand, seven hundred dollars, and for costs of suit, for a decree requiring the defendant to surrender to Plaintiff said promissory note and to execute, acknowledge and deliver to him, as such administrator, a conveyance of said land, and for general relief.

It is said in the decision on demurrer: "This is an action on the part of Albert F. Price, as Administrator of the estate of William E. Price, deceased, appointed in the District Court of the Second Judicial District of the State of Nevada, in and for Washoe County, against M. E. Ward, a resident of this jurisdiction, to obtain a decree of this Court declaring a deed, executed in this jurisdiction by William E. Price, in his lifetime, of property situated in Sierra (Nevada) County, State of California, a mortgage, to compel a conveyance of said property to said Albert F. Price, as Administrator, and for triple damages for waste committed on said property by said Defendant." It is further said: "Taking for the allegations of the complaint as true it simply amounts to a declaration that this property is the property of the estate of William Price, deceased, in the State of California, subject to administration in that state; it gives a right of action, not to the administrator appointed in the State of Nevada, but to the administrator appointed or that should be appointed, in the State of California. The claim for damages for waste rests upon the same basis."

That this deed, in effect, is simply a mortgage under the allegations of the complaint is not contraverted and needs no citation of authorities. That some one is entitled to a decree declaring it to be a mortgage seems clear. It seems clear that the Defendant is liable to account to some one, in some court, for the net value of said lumber and sawed timber, that he removed from the mortgaged premises and converted to his own use, alleged to be the sum of six thousand dollars. It likewise appears that some one is entitled to a personal judgment against the Defendant for the difference between said net value of six thousand dollars and said one thousand and seven hundred dollars due from said estate to Defendant, and to a conveyance of said land from the Defendant so as to put the title in the true owner, the Estate of William Price, and to have said promissory note given up.

To recover the net value of said property so converted, or a judgment for the difference between said value and the one thousand, seven hundred dollars due the Defendant, the action would have to be prosecuted in a court having jurisdiction of the person of the Defendant. No Court in the State of California can acquire jurisdiction of the person of the Defendant in the State of Nevada, the place of his residence, by the service in this State of any process or notice that it may issue. We cannot presume that the Defendant would voluntarily appear in such action and submit his person to the jurisdiction of such court. An administrator appointed in California could not maintain such an action in a court in the State of Nevada. If such action cannot be maintained in a Nevada court then the Defendant may retain said lumber and timber or the proceeds of the sale thereof to his own use, although, as shown by the complaint and admitted by he Defendant, as the case now stands, the same is not his property.

In Edwards, Curator vs. Ballard, 14 La. 362, it is held, that although no real action would lie in Louisiana for lands sold in Mississippi, yet a suit brought to recover the proceeds of those lands from a defendant domiciled in Louisiana would fall within the jurisdiction of the Louisiana courts.

In most of the States, under the common law and the statutes, the real estate of the deceased person descends directly to the heir or devisee, without passing through the custody of the executor or administrator; from this rule counsel seems to base his contention that the Plaintiff could not maintain an action against the Defendant on any cause accruing with respect to real estate after the death of the intestate, even though the property was situated in this State, that the right of action would belong solely to the heir or devisee. But in several of the States, including Nevada, California, Alabama and Minnesota, the personal representative is entitled to the possession and control, for the purpose and during the term of the administration, of the real as well as the personal property of the decedent. (Woerner, Sec. 337; Statutes of Nevada.) For particular purposes the letters of administration relate back to the time of the death of the intestate and vest the property in the administrator from that time. On this principle an administrator may maintain trespass for injuries to the goods of the interstate committed after such death and before his appointment. (Woerner, Sec. 173).

And where the administrator under the statute is put into possession of the real estate as well as the personal estate, any action necessary to protect the same against wrong doers, or to recover damages for injuries thereto, including ejectment for possession, must lie in favor of the administrator. (*Id.* Sec. 293, and cases cited Note 2).

When he has properly asserted his right to the possession, he may maintain possessory action in his own name, even against the heirs or devisees, or recover the rents, incomes or profits, or for injury to the land, or anything severed from it, or for injuries committed before he took possession and after the death of the decedent. (*Id.* Sec. 337).

"An executor or administrator, may maintain an action to recover timber logs cut and removed by a trespasser from the lands of the estate, although the heir or devisee may also maintain an action, on failure of the personal representative to assert his statutory rights."

(Leatherwood vs. Sullivan, 81 Ala. 458.)

"A personal representative who has taken possession of the real estate of the decedent can maintain an action for injuries to such realty committed *post mortem decedentis*. This is so, even if the injuries were committed before he took possession, and before his letters of administration were granted."

(Nixon vs. Finnigan, 32 Minn. 81.)

"If the premises are vacant and unoccupied, the bringing of such action would be equivalent to taking possession." (*Id.* 32 Minn. 418.)

"The whole estate real and personal under our system is assets and may be if required, applied to the payment of the debts of the estate."

(Washington vs. Black, 82 Cal. 286.)

I think said contention of counsel and the inference sought to be drawn therefrom against the rights of the administrator in this case are without merit.

It is argued by the trial court, and by counsel that a decree declaring said deed to be a mortgage and requiring the Defendant to execute a deed to the Plaintiff by the District Court of Washoe County, would be meddling or interfering with the devolution of the property of the estate in the State where it is located, and that the courts of that state would disregard such decree and deed, and that the Defendant would be still liable to an action for waste by an administrator appointed in California.

The answer to this contention is first: That such deed would in no manner meddle with the devolution of the property of the estate situated in California, or interfere with the administration of the estate there. A deed from the Defendant to the Plaintiff as administrator would simply take the title out of the Defendant and place it in the Plaintiff as administrator, showing that the property belonged to the estate of the deceased, whereas, it now appears of record in the Recorder's office of Nevada County, California, to belong to the Defendant.

It would form the basis for, and facilitate the administration of the estate of William Price in that State.

Second: There would be no occasion for the Administrator when appointed in California to bring a suit to have said deed to the Defendant decreed to be a mortgage and thus determine the true ownership of said land.

Third: Such administrator could not recover a judgment against the Defendant for waste or for the value of said lumber and timbers converted as aforesaid unless the Defendant voluntarily placed himself within the jurisdiction of a California court.

The contention that the courts of California would pay no attention whatever to any such deed from the Defendant is simply an assumption of counsel.

It seems well established by the authorities cited by Appellant's counsel, that when the court has acquired jurisdiction of the parties in a matter of proper equitable cognizance, it may by acting *in personam*, compel the conveyance of interests in real property, and administer other relief in the furtherance of justice, notwithstanding the property or interest involved may be situated within the State.

From the allegations of the complaint it appears that the Defendant has unlawfully appropriated a portion of said property of said estate. The deed prayed for would be a means to prevent further unlawful appropriation and preserve the remainder of said property to said estate which equity and good conscience demand.

That the complaint shows that some one is entitled at least to recover a personal judgment against the Defendant for said value of said lumber and timbers, less the said sum due the Defendant, and a decree declaring that said deed to Defendant is a mortgage, and requiring him to execute a deed to said land and to give up said promissory note, I think cannot be reasonably disputed.

The vital question in the case is: Is the Plaintiff entitled to such a judgment and decree? If so he can prosecute this action therefor. The moneys collected on such judgment by the Plaintiff would properly be assets of said estate and subject to the payment of resident and non-resident creditors of the intestate who have presented, or who may present their claims in pursuance of the provisions of the statute. The policy of the law in every State is to subject all the property of the decedent, real and personal, to the payment of the creditors of the decedent, except certain reasonable exceptions for the benefit of his family. If the Plaintiff cannot maintain this action to recover such judgment then the heirs alone may sue the Defendant and recover the value of said lumber and timber for their own use and deprive all of said creditors thereof, in contravention of said policy, for if the administrator could compel the heirs to account for the moneys collected of the Defendant for the value of said property, I see no reason why he may not maintain the action against the Defendant for said value. Such judgment in favor of the Plaintiff would inure to the benefit of all creditors of the deceased and to all his heirs in manner contemplated by the law and would be no injury to any one. And the deed prayed for would benefit all parties who have any interest in the estate situated in California by placing the title beyond dispute in the estate there, and thus aid in the prompt administration thereof, while as I think I have shown above the Defendant can be in no manner injured in any of his rights or subjected to a second recovery for the value of said property so converted by him.

The Plaintiff is liable for the payment of said promissory note so far as anything appears to the contrary, and if he has not the legal capacity to maintain this action he has no defense against said note. He could not properly set up as a defense in an action on this note by the Respondent any of the matters contained in the complaint herein. The Respondent may then retain said lumber and timber to his own use without accounting to the Plaintiff therefor and compel the Plaintiff to pay said note if there be sufficient assets in his hands. I am of opinion that Albert F. Price as the legal representative of the intestate has the right to maintain this action for the recovery of a judgment and decree above indicated and that it is his duty to do so in the interests of the creditors of the decedent and all persons having an interest in said estate. I am of opinion that the order of the District Court sustaining said demurrer should be overruled and the judgment reversed.

Filed November 8th, 1899.

EUGENE HOWELL,
Secretary of State and Ex-officio Clerk of the Supreme Court.

Filed with printer for official publication November 8, 1899.

EUGENE HOWELL.